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**PREVENTION OF DISCRIMINATION**

**The rights of non-citizens**

# Progress report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decisions 2000/103 and 2001/108, as well as Commission decision 2002/107

**Addendum**

**Regional activities**

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## I. INTRODUCTION

1. This addendum (E/CN.4/Sub.2/2002/25/Add.2) to the progress report of the Special Rapporteur on the rights of non-citizens (E/CN.4/Sub.2/2002/25) supplements the 2001 addendum (E/CN.4/Sub.2/2001/20/Add.1) to the preliminary report of the Special Rapporteur (E/CN.4/Sub.2/2001/20) by providing an expanded examination of the rights of non-citizens within regional human rights bodies. The addendum thereby supplements the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights that was examined briefly in the 2001 report. The addendum also includes new material on the jurisprudence of the African Commission on Human and Peoples' Rights with regard to the rights of non-citizens and discusses the Framework Convention on National Minorities, adopted under the auspices of the Council of Europe.

## II. JURISPRUDENCE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

2. The African Commission on Human and Peoples' Rights (African Commission) has considered the rights of non-citizens under a number of articles of the African [Banjul] Charter on Human and Peoples' Rights (Banjul Charter), including in particular articles 7, 12, 14, and 18. With respect to non-citizens, many of the specific articles interpreted by the African Commission have been read in conjunction with the non-discrimination clause of article 2, which states:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

### A. Articles 7 and 12

3. Several cases decided by the African Commission with regard to non-citizens involved alleged violations of article 7 and article 12.

4. Article 7 protects a number of components of the right to a fair trial, stating that:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> "(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> "(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> "(c) the right to defence, including the right to be defended by counsel of his choice;

"(d) the right to be tried within a reasonable time by an impartial court or tribunal.

"2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

5. Article 12 states that:

"(1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

"(2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

"(3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.

"(4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.

"(5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."

6. In October 1996, the African Commission decided *Organisation mondiale contre la torture v. Rwanda*,[1] which involved the expulsion from Rwanda of Burundian nationals who had been refugees in Rwanda for several years. Prior to their expulsion, the complainants were not allowed to defend themselves before a competent court.[2] The Commission found that the complainants were arrested, detained and expelled based on grounds of ethnic origin alone.[3]

7. By expelling the complainants without giving them the opportunity to be heard by the national judicial authorities, the Commission held that the Government of Rwanda had violated article 7 (1) of the Banjul Charter.[4]

8. Furthermore, the Commission stated that article 12 "should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State".[5] The Commission therefore held the Government of Rwanda had violated article 12 (4) prohibiting the arbitrary expulsion of such persons from the country of asylum.[6] Additionally, the mass expulsion of the complainants based on their nationality constituted a violation of article 12 (5).[7]

9. In October 1997, the African Commission considered a similar case in *Rencontre africaine pour la défense des droits de l'homme v. Zambia*,[8] involving a situation where the Government of Zambia expelled 517 West Africans on 26 and 27 February 1992 on the grounds that they were in Zambia unlawfully.[9]

10. In considering this case, the Commission stated that article 12 "imposes an obligation on the contracting States to secure the rights protected in the Charter to all persons within their jurisdiction, nationals and non-nationals".[10]

11. Because the deportees had been denied access to the Zambian courts to challenge their detention or deportation, the Government of Zambia had violated article 7 of the Banjul Charter.[11] Additionally, because the deportees were expelled based on nationality, the Government had violated article 12 (5).[12]

12. On 11 November 1997, the African Commission decided *Fédération internationale des Ligues des droits de l'homme v. Angola*,[13] which involved the expulsion of West African nationals from Angola in 1996.[14]

13. The Commission noted that African States in general, and the Republic of Angola in particular, are faced with many economic challenges and that States often resort to measures aimed at protecting their nationals and their economies from non-nationals. The Commission noted, however, that such measures should not be taken to the detriment of the enjoyment of human rights and that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial, or other considerations constitute a violation of human rights.[15]

14. Because the deportees were not allowed to challenge their expulsion, the Commission held that the Government of Angola had violated articles 7 and 12 (4). Additionally, because they had been expelled based on their nationality, the Commission found a violation of article 12 (5).

15. *Amnesty International v. Zambia*[16] involved the deportation of William Steven Banda and John Luson Chinula, both of whom had resided in Zambia for many years.

16. Mr. Banda unsuccessfully challenged his deportation in the Zambian courts, but was denied access to the administrative proceedings that should have been available to him under the Citizenship Act.[17] The African Commission found that the Government of Zambia had therefore violated articles 7 and 12 (4) of the Charter.[18]

17. Mr. Chinula was not allowed to challenge his deportation and was forcibly deported.[19] When Mr. Chinula sought to return to Zambia in order to challenge his expulsion he was threatened with imprisonment.[20] The African Commission found a violation of article 7.[21]

### B. Article 14

18. Article 14 of the Banjul Charter sets forth:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

19. *Fédération internationale des Ligues des droits de l'homme v. Angola* also involved a violation of article 14, because the Commission found that the expulsion of the West Africans resulted in some of them losing the property they owned in Angola.[22]

### C. Article 18

20. Article 18 of the Banjul Charter states:

> "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
>
> "2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
>
> "3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.
>
> "4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs."

21. *Fédération internationale des Ligues des droits de l'homme v. Angola* also involved a violation of article 18, because the Commission found that the expulsion of the West Africans resulted in the separation of some of the deportees from their families.[23]

22. *Amnesty International v. Zambia*, discussed above, also resulted in Mr. Banda and Mr. Chinula being separated from their families, and hence the Commission found a violation of article 18 (1) and (2).[24]

## III. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

23. The European Court of Human Rights has considered the rights of non-citizens under a number of articles to the European Convention on Human Rights including in particular articles 3, 5, 6, 8, 14 and 16.

### A. Article 3

24. Article 3 states:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

25. In a series of cases, including *Vilvarajah and Others v. United Kingdom*,[25] *Chahal v. United Kingdom*,[26] and *Ahmed v. Austria*,[27] the European Court has held that to expel or deport a non-citizen with a well-founded fear of persecution within the terms of the 1951 Convention relating to the Status of Refugees would amount to a violation of article 3 because the petitioner would, if expelled or deported, be subjected to treatment prohibited by that article.

26. On 6 March 2001, the European Court again considered the situation of a person facing expulsion and alleging a well-founded fear of persecution in the receiving State. In *Hilal v. United Kingdom*,[28] the petitioner alleged he had a well-founded fear of persecution in the United Republic of Tanzania on account of his political opinion and membership in an opposition political party. Based on human rights reports, the Court found that the petitioner would face a serious risk of being subjected to torture or inhuman and degrading treatment if returned to Tanzania and thus his expulsion, if carried out, would constitute a violation by the United Kingdom of article 3 of the European Convention.

27. The European Court has also considered whether deportation to a country where needed medical treatment is unavailable violates article 3. *D. v. United Kingdom*[29] involved an applicant in the advanced stages of AIDS who had been receiving health treatment necessary for his survival. The applicant faced deportation to St. Kitts because of a criminal conviction. The Court noted that the applicant was in the "advanced stages of a terminable and incurable illness", that the respondent State had "assumed responsibility for treating the applicant's condition since August 1994", that the applicant had "become reliant on the medical and palliative care which he [was] receiving", and that the "abrupt withdrawal of these facilities will entail the most dramatic consequences for him".[30] The Court therefore held that, "in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of article 3".[31] The Court emphasized "that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison", but that "in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of article 3".[32]

28. The case of *Bensaid v. United Kingdom*,[33] however, involved an applicant who was "a schizophrenic suffering from a psychotic illness". The applicant argued that if removed to Algeria he would not have access to the medical treatment necessary to prevent a relapse of his

condition. The Court noted that the medical treatment available in the United Kingdom was superior to that available in Algeria and accepted "the seriousness of the applicant's medical condition".[34] The Court, however, "having regard ... to the high threshold set by article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm [did] not find that there [was] a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of article 3 [and that] it [did] not disclose the exceptional circumstances of the case of *D. v. United Kingdom*".[35]

## B. Article 5

29. Article 5 (1) (f) states:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> > (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

30. The European Court considered article 5 (1) (f) of the European Convention in the case of *Amuur v. France*[36] in 1996. *Amuur* involved four Somali nationals who fled Somalia via Kenya and the Syrian Arab Republic and arrived at Orly Airport in Paris on 9 March 1992. Upon arrival, the petitioners were refused entry because their travel documents were not in order. French immigration authorities then transferred the four petitioners to a nearby hotel that was used for holding persons denied entry to the country and which was legally considered an "international zone" rather than French territory. The petitioners sought to apply for asylum from the hotel but were not allowed legal or social assistance. On 29 March the four were deported to Syria. Two days later, the Creteil Tribunal de grande instance of Creteil found that the detention of the applicants was unlawful and ordered their release, although they had already been returned to Syria.

31. The European Court considered a number of factors in determining whether the detention constituted a restriction upon liberty or a deprivation of liberty as defined in article 5 (1) of the European Convention. The Court noted that the difference between a lawful and an unlawful restriction upon liberty was a matter of degree and that factors to be examined included the type, duration, effects, and manner of implementation of the measure in question. The Court stated that the "international zone" was a legal fiction and, despite its name, did not have extraterritorial status and that any "prolongation [of the detention] requires speedy review by the courts".[37] Of particular weight in the Court's deliberation was the fact that the petitioners were unable to access the procedures, including legal assistance, necessary to pursue their asylum applications. Furthermore, neither the length nor the necessity of the confinement was viewed by a court until 26 March 1992. For these reasons, the European Court found a breach of article 5 (1) (f) of the Convention.

## C. Article 6

32. Article 6 states:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

"(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

"(3) Everyone charged with a criminal offence has the following minimum rights:

"(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

"(b) to have adequate time and facilities for the preparation of his defence;

"(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

"(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

"(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

33. Regarding article 6, the European Court has held, most recently in *Maaouia v. France*,[38] that the right to the fair trial protections of article 6 does not apply to decisions regarding the entry, stay, or deportation of aliens, as these decisions do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of article 6 (1) of the Convention. The Court reasoned that, "by adopting article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens ... States clearly intimated their intention not to include such proceedings within the scope of article 6, paragraph 1, of the Convention."[39]

34. Article 1 of Protocol No. 7 to the European Convention on Human Rights states:

"1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

"(a) to submit reasons against his expulsion,

"(b) to have his case reviewed, and

"(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. An alien may be expelled before the exercise of his rights under paragraph 1 (a), (b) and (c) of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

35. In a subsequent admissibility decision,[40] the Court applied the rule of *Maaouia* to a proceeding in which a criminal sentence of expulsion was challenged. The applicant had claimed that his conviction and expulsion sentence had been obtained in a manner that violated provisions of article 6. The Court reasoned:

"The domestic legal order's characterization of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature. Other factors, notably the nature of the penalty concerned, have to be taken into account. In general, exclusion orders are not characterized as criminal within the member States of the Council of Europe. Such orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of article 6 paragraph 1, of the Convention. The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature."[41]

### D. Article 8

36. Article 8 states:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

"(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

37. The following cases, also contained in the 2001 addendum, reflect the European Court's article 8 jurisprudence. For additional article 8 cases please refer to the 2001 addendum (E/CN.4/Sub.2/2001/20/Add.1), paragraphs 119 to 133.[42]

38. The seminal judgement regarding article 8 occurred on 21 June 1988 in *Berrehab v. the Netherlands*.[43] In *Berrehab*, the Court defined the effect of article 8 on the deportation of non-citizens. The substance of the decision was that where the non-citizen has real family ties in the territory of the State from which he is ordered deported, and the deportation measure is such as to jeopardize the maintenance of those ties, the deportation is justified with regard to article 8 if it is proportionate to the legitimate aim pursued. In other words, the deportation is justified only if the interference with family life is not excessive with respect to the public interest to be protected. The public interest often balanced against the right to respect for family life is the State's interest in maintaining public order and arises in the context of non-citizens convicted of criminal offences.

39. *Berrehab v. the Netherlands*, however, did not involve a criminal conviction. Mr. Berrehab, a citizen of Morocco, was married to a Dutch citizen and received residency status on that basis. Mr. Berrehab and his spouse later divorced in 1979. Mr. Berrehab, however, had one daughter by the marriage and after the divorce was appointed as his daughter's auxiliary guardian and granted frequent and regular visitation with his daughter.

40. In 1983 Mr. Berrehab's residency permit was not renewed on account of the divorce and he was subsequently arrested and ordered deported. The Court, applying the balancing test presented above, found that the deportation order violated article 8 of the Convention.

41. In 1991 the European Court of Human Rights considered the case of *Beldjoudi v. France*[44] in which both the person sought to be deported and his spouse, who possessed French citizenship, challenged the deportation on the grounds that it would violate article 8. Mr. Beldjoudi was born in France, but he was considered an Algerian citizen. In the late 1960s and 1970s he was convicted of a number of criminal offences including assault and battery, theft, aggravated theft, driving a vehicle without a licence and possession of weapons. These convictions led to a deportation order being issued in 1979. The Court considered a number of factors favourable to Mr. Beldjoudi, including that he was born in France and had had French nationality until 1 January 1963. He was deemed to have lost that nationality when he was still a juvenile because his parents neglected to reaffirm their French nationality pursuant to the Evian Agreements of 19 March 1962. The Evian Agreements of 19 March 1962 provided that persons born in Algeria while it was a French department, and thereby acquiring French citizenship, were deemed to have relinquished that citizenship if they did not make a declaration recognizing French nationality before 27 March 1967. Upon reaching adulthood he tried to re-establish his French nationality. He had served in the French military, he was married to a French citizen, and his close relatives had resided in France for several decades. Upon consideration of these factors the Court held that the deportation order was not proportionate to the legitimate aim pursued and therefore violated both Mr. Beldjoudi's and his spouse's rights under article 8.

42. On 26 September 1997, the European Court issued rulings in two cases with somewhat similar factual situations. The cases, *Mehemi v. France*[45] and *El Boujaïdi v. France*,[46] involved Algerian and Moroccan citizens, respectively. At the time of consideration of the first case, Mr. Mehemi was living in Algeria after being deported from France on 28 February 1995. The respondent State issued an exclusion order barring Mr. Mehemi from returning to French territory. His parents remained in France, where they had resided for approximately 40 years, as did four siblings, two of whom were French citizens. Mr. Mehemi had attended French schools

until the age of 17 and was married to an Italian national with whom he subsequently had three children of French nationality. On 22 January 1991 Mr. Mehemi was convicted of a drug offence and ordered deported to Algeria. The European Court found that Mr. Mehemi was completely integrated into French society and had no links to Algeria other than citizenship. It held that although the deportation was a form of interference that was "in accordance with the law" and had a legitimate aim, namely the prevention of disorder or crime, the interference was not "necessary in a democratic society" because it was not justified by a pressing social need nor was it proportionate to the legitimate aim pursued. The Court thus found a violation of article 8 of the Convention.

43. In the second case decided on 26 September 1997, Mr. El Boujaïdi had been convicted of a drug offence in 1988. French authorities deported Mr. El Boujaïdi to Morocco and excluded him from returning to France, where he had lived since 1974. The Court articulated its task with respect to article 8 jurisprudence as consisting of "ascertaining whether the measure in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other."[47] The European Court found that Mr. El Boujaïdi had a previous conviction from a drug offence for which he was incarcerated for a time, after which he continued to be involved in criminal activity while living in France unlawfully. This fact alone, in the Court's view, weighed heavily against the petitioner. Additionally, the Court also found that he had links to Morocco beyond simply having Moroccan nationality. The Court therefore distinguished *El Boujaïdi* from *Mehemi* because the former did have some ties to the country to which he was to be expelled, including being able to speak Arabic and having family and friends in Morocco. Applying the balancing test between the interference with article 8 (1) rights vis-à-vis the State's interests, the Court concluded that Mr. El Boujaïdi posed a greater threat to the respondent State's interests in public safety and prevention of disorder or crime than did Mr. Mehemi. The Court, having found that the enforcement of the exclusion order was not disproportionate to the State's legitimate aims, concluded there had been no violation of article 8 with respect to the expulsion of Mr. El Boujaïdi.

44. Also in 1997, the Court issued a ruling in the case of *Boujlifa v. France*.[48] The applicant was a Moroccan national who entered France to join his father at the age of five. When he was 20 the applicant committed several crimes. After serving prison sentences following two convictions for robbery, the applicant was extradited to Switzerland where he served a further sentence for theft. Upon his release from a Swiss prison in 1988 he returned to France to live with his parents. In early 1990 he was informed that deportation proceedings had been initiated against him as a result of his earlier robbery convictions.

45. In assessing the proportionality of the deportation order, the Court observed that the applicant had received all of his schooling in France and that his entire family resided there. The Court noted, however, that the applicant had not sought to acquire French nationality when he became eligible to do so. In view of the seriousness of the applicant's offences, the Court found that the deportation was not disproportionate to the legitimate aim of preventing crime and public disorder.

46. In *Dalia v. France*,[49] the Court considered an expulsion order imposed on an Algerian woman residing in France. Aïcha Dalia had arrived in France in 1977 or 1978 at the

age of 17 or 18 to join the rest of her family. In 1986 she was convicted of dealing in heroin and a permanent exclusion order was imposed. After spending nearly a year in Algeria, the applicant returned to France in July 1989 with a visa valid for 30 days. Following expiration of the visa, she remained in France. In 1990 she gave birth to a baby with French nationality.

47. In weighing the permanent exclusion order the Court considered several facts. First, the Court noted that the applicant had lived in Algeria until the age of 17 or 18, for two years without her parents, and had maintained family relations there. Second, she spoke the local language and had established social and school relationships in the country. Therefore, the Court observed, "her Algerian nationality is not merely a legal fact but reflects certain social and emotional links. In short, the interference in issue was not so drastic as that which may result from the expulsion of applicants who were born in the host country or first went there as young children."[50] As for the applicant's French child, the Court noted that "the applicant formed this vital family link when she was in France illegally. She could not be unaware of the resulting insecurity."[51] Finally, the Court observed that the exclusion order was the result of a conviction for "dangerous dealing in heroin" and that "[i]n view of the devastating effects of drugs on people's lives, the Court understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge."[52] In light of all of these factors, the Court found that there had been no violation of article 8.

48. In *Baghli v. France*,[53] the Court considered the case of an Algerian national challenging an exclusion order imposed by French authorities. The applicant had entered France in 1967 at the age of two and had remained there except for a two-year period of mandatory military service in Algeria. Following a drug trafficking conviction in 1991 he received a 10-year exclusion order barring him from French territory.

49. In assessing the proportionality of the exclusion order, the Court observed that although the applicant's parents and siblings all resided in France, he did not maintain close ties with them. Moreover, the applicant had preserved ties with Algeria, having several times travelled to the country on holiday. The Court further noted the seriousness of the offence underlying the exclusion order. In view of all of these circumstances, the Court found the order proportionate to the legitimate aim of preventing crime and public disorder and accordingly rejected the applicant's claim

50. In *Ciliz v. the Netherlands*,[54] the European Court considered the case of a Turkish citizen residing in the respondent State. The petitioner was originally allowed to reside in the Netherlands on account of being married to a Dutch citizen. The couple subsequently had a child. Upon the dissolution of the petitioner's marriage, he was given up to one year to seek employment. After not finding employment in that time, the respondent State rejected his request for an extension of his residence permit. The petitioner challenged the rejection on the ground that it would force him to leave the Netherlands and thereby sever his contact with his son, which he alleged would violate article 8 of the Convention.

51. The European Court, having in mind its previous jurisprudence, noted that the bond which existed between a parent and child fell within the meaning of article 8 (1) and that such a relationship was not terminated by reason of the fact that the parents separate or divorce, and as a result the child ceases to live with the parent in question. Hence, the Court concluded that,

although the respondent State's action was aimed at the preservation of the economic well-being of the country and thus served a legitimate aim within the meaning of article 8 (2), that the interference with the petitioner's rights under article 8 was not necessary in a democratic society and therefore constitutes a breach of article 8.

52. In *Ezzouhdi v. France*,[55] the Court considered the case of a Moroccan national who had lived in France since the age of five. Following a conviction for a drug-related offence, French authorities imposed an exclusion order on the applicant requiring him to leave France permanently. The applicant's family resided in France, where he had been educated and employed. Noting his family ties in France, that his conviction was for the personal use of drugs, and that none of his prior convictions indicated he posed a serious threat to the public, the Court unanimously found that the exclusion order imposed on Ezzouhdi violated article 8.

## E. Article 14

53. Article 14 states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

54. With respect to article 14, the European Court considered the case of *Darby v. Sweden*.[56] In *Darby* the Court held that a Swedish law that denied non-citizens the right to claim exemption from a church-tax violated article 14, when taken together with article 1 of Protocol No. 1 (the right to peaceful enjoyment of one's possessions).

55. Similarly, in *Gaygusuz v. Austria*,[57] the Court held that Austria's refusal to grant emergency economic assistance to a legal resident alien on the basis of his non-citizen status violated article 14, when taken together with article 1 of Protocol No. 1.

## F. Article 16

56. Article 16 states:

> " Nothing in articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

Articles 10, 11 and 14 guarantee freedom of expression, freedom of assembly and association, and freedom from discrimination in the enjoyment of Convention rights respectively.

57. The European Court first considered the content of article 16 in *Piermont v. France*,[58] decided in 1995. The applicant, a German national and member of the European Parliament visited French Polynesia in 1986. While there, she participated in a demonstration in favour of political independence and opposed to French nuclear testing in the South Pacific. The applicant spoke at the rally and labelled French presence in the territories an "interference in the affairs of

the Polynesians." Shortly thereafter she was served with an expulsion order. The applicant complained, inter alia, that her expulsion violated the freedom of expression guaranteed under article 10 of the European Convention. In defending the expulsion, the French Government invoked article 16 of the European Convention. The European Court rejected that argument, explaining simply that "... Mrs. Piermont's possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow article 16 of the Convention to be raised against her, especially as the people of the [Overseas Territories] take part in the European Parliament elections."[59]

## IV. EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

58. The European Framework Convention for the Protection of National Minorities was adopted by the Council of Europe on 1 February 1995 and entered into force on 2 January 1998. The Framework Convention does not define the term "national minorities" because the member States of the Council of Europe failed to agree on any such definition.[60]

59. The *travaux préparatoires* provide little guidance, as the Governments expressed varying views on the definition generally.

### A. Framework Convention interpretation

60. The rules of treaty interpretation provided by the Vienna Convention of the Law of Treaties offer some guidance, however, and the application of those rules leads to the conclusion that the Framework Convention does apply to non-citizens.

61. First, the Framework Convention is silent as to its scope vis-à-vis non-citizens. Its express terms do not include or exclude non-citizens from its protections.

62. Second, the express wording and ordinary meaning of the provisions of the Framework Convention refer to "persons" or "every person" belonging to a national minority. As the Framework Convention is a human rights instrument, the terms "persons" and "every persons" should be interpreted to mean every human being without discrimination.

### B. Application of the Framework Convention

63. General practice also indicates that the Framework Convention does apply to non-citizens. For instance, several States parties provided interpretive declarations with their respective instruments of ratification that expressly stated that the State party would not apply the Convention to non-citizens. Such interpretive declarations, essentially reservations, indicate that in the absence of such declarations the States parties interpret the Framework Convention as applying to non-citizens.

64. The Advisory Committee and the Committee of Ministers, established as responsible bodies under the Framework Convention to supervise it implementation, have both offered views indicating that the Convention applies to non-citizens.

65. In its Opinion on Croatia, the Advisory Committee welcomed the inclusive interpretation of the Framework Convention by the Government of Croatia, but stated further that it was "of the opinion that it would also be possible to consider the inclusion of persons belonging to additional groups, including non-citizens[,] as appropriate, in the application of the Framework Convention on an article-by-article basis".[61]

66. Similarly, in its Opinion on the Czech Republic adopted on the same day, the Advisory Committee expressed the opinion that "it would be possible to consider the inclusion of ... non-citizens[,] as appropriate, in the application of the Framework Convention on an article-by-article basis".[62] The Advisory Committee reiterated this position in its Opinion on Romania[63] and Opinion on Cyprus.[64]

67. The Council of Ministers, in its respective resolutions on the Advisory Committee opinions on the Croatia,[65] Cyprus,[66] and the Czech Republic[67] recommended to the respective States that they "take appropriate account of the . . . various comments in the Advisory Committee's opinion[s]".

## V. JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

68. In October 1999, the Inter-American Court of Human Rights issued an advisory opinion in the matter of *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law*.[68] The Government of Mexico requested the Advisory Opinion after a Mexican national, Mario Murphy, had been executed in the State of Virginia. Virginia authorities carried out the execution despite clear evidence that Mr. Murphy had never been informed of his right to consular assistance under the Vienna Convention on Consular Relations. After concluding that the right to consular assistance under the Vienna Convention is a human right, the Court ruled that a non-citizen detained in a State party to the Convention must be informed immediately of his right to consular assistance and that any failure to observe the requirements of the Vienna Convention in a death penalty case constitutes an arbitrary deprivation of life.

### Notes

[1] *Organisation mondiale contre la torture v. Rwanda*, African Comm. Hum. & Peoples' Rights, Comm. No. 27/89, 46/91, 99/93 (October 1996).

[2] Ibid., para. 1.

[3] Ibid., para. 28.

[4] Ibid., para. 34.

[5] Ibid., para. 30.

[6] Ibid.

[7] Ibid., para. 32.

[8] *Rencontre africaine pour la défense des droits de l'homme v. Zambia*, African Comm. Hum. & Peoples' Rights, Comm. No. 71/92 (October 1997).

[9] Ibid., para. 1.

[10] Ibid., para. 22.

[11] Ibid., para. 30.

[12] Ibid., *Decides*.

[13] *Fédération internationale des Ligues des droits de l'homme v. Angola*, African Comm. Hum. & Peoples' Rights, Comm. No. 159/96 (11 November 1997).

[14] Ibid., para. 1.

[15] Ibid., para. 16.

[16] *Amnesty International v. Zambia*, African Comm. Hum. & Peoples' Rights, Comm. No. 212/98 (5 May 1999).

[17] Ibid., paras. 7 and 44.

[18] Ibid., para. 44.

[19] Ibid., para. 7.

[20] Ibid., para. 11.

[21] Ibid., para. 46.

[22] *Fédération internationale des Ligues des droits de l'homme v. Angola*, op. cit., para. 17.

[23] Ibid.

[24] *Amnesty International v. Zambia*, op. cit., para. 59.

[25] 215 Eur. Ct. H.R. (Ser. A) (1991).

[26] 23 EHRR 413 (1997).

[27] 24 EHRR 278 (1997).

[28] 33 EHRR (2001).

[29] 24 EHRR 423 (1997).

[30] Ibid.

[31] Ibid.

[32] Ibid., para. 54.

[33] 33 EHRR (2001).

[34] Ibid., para. 40.

[35] Ibid.

[36] 22 EHRR 533 (1996).

[37] Ibid., para. 43.

[38] 33 EHRR 42 (2001)

[39] Ibid, para. 37.

[40] *Lakatos v. Czech Republic*, Application No. 42052/98 (23 October 2001).

[41] Ibid.

[42] The 2001 addendum (E/CN.4/Sub.2/2001/20/Add.1) contains summaries of the following cases: *C. v. Belgium, Bouchelkia v. France, Moustaquim v. Belgium, Nasri v. France, Purtonen v. Finland* and *S.N. v. the Netherlands*.

[43] 138 Eur. Ct. H.R. (Ser. A) (1988).

[44] 234 Eur. Ct. H.R. (Ser. A) (1992).

[45] 30 EHRR 739 (1997).

[46] 30 EHRR 223 (1997).

[47] Ibid., para. 40.

[48] Application No. 25404/94, Eur. Ct. H.R. (21 October 1997).

[49] Application No. 26102/95, Eur. Ct. H.R. (19 February 1998).

[50] Ibid., para. 53.

[51] Ibid.

[52] Ibid.

[53] 33 EHRR 32 (2001).

[54] Application No. 29192/95, Eur. Ct. H.R. (11 July 2000) (not yet published).

[55] Application No. 47160/99, Eur. Ct. H.R. (13 February 2001) (not yet published).

[56] 187 Eur. Ct. H.R. (Ser. A) (1990)

[57] 23 EHRR 364 (1996).

[58] 314 Eur. Ct. H.R. (Ser.A) (1995).

[59] Ibid. at para. 64

[60] The Explanatory Report to the Framework Convention observes that the drafters "decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States" (para. 12). Available at http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/Explanatory%20report/explreport.htm

[61] Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Croatia, adopted on 6 April 2001.

[62] Ibid., Opinion on the Czech Republic, adopted on 6 April 2001.

[63] Ibid., Opinion on Romania, adopted on 6 April 2001.

[64] Ibid., Opinion on Cyprus, adopted on 6 April 2001.

[65] Council of Europe, Council of Ministers, ResCMN(2002)1 on the implementation of the Framework Convention for the Protection of National Minorities by Croatia.

[66] Ibid., ResCMN(2002)3 on the implementation of the Framework Convention for the Protection of National Minorities by Cyprus.

[67] Ibid., ResCMN(2002)2 on the implementation of the Framework Convention for the Protection of National Minorities by the Czech Republic.

[68] Advisory Opinion OC-16/99 (1 October 1999).

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